which he had overlooked, as the judge himself had afterwards the candor to admit The remaining question is, whether any alteration has been effected in this matter by the Evidence Act, 14 & 15 Vict. c. 99, which renders the parties to a cause competent witnessess. No doubt there is considerable force in the observation of Alderson, B., in the text, that a man may now *swear himself* into an estate; at the same time it may be as well to remember that before the statute he might by means of perjured testimony have *bought himself* into it. Taking all the circumstances of this case of *Davies* vs. *Roper* into consideration, it might be going too far to say that the court in granting the second new trial overstepped their constitutional authority; but the *principle* obviously involved in the language of the barons, that the stability of every verdict on matter of facts is to depend for the future on the approval of the judge by whom the cause was tried, is rather an alarming one, and if followed up by subsequent decisions, will prove an offshoot from the Evidence Act little contemplated by its framers.—JURIST REPORTER.

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK. By Alexander W. Bradford, LL. D., Surrogate. New York: John S. Voorhies, Law Bookseller and Publisher, 20 Nassau street, 1856.

This series of Reports was commenced in June, 1851. In this volume the cases are brought down to February, 1856, and in the three volumes of the series, we have all the decisions hitherto published, of the learned Surrogate of New York. Taken together, they form a body of what we may call, for want of a better name, American Ecclesiastical Law, nowhere else to be found in our libraries: and it is some satisfaction for the American lawyer to have volumes like these, to place by the side of Phillimore and Haggard, and to know they are worthy of a place on the same shelf with the decisions of Stowell and Nichol. It is especially satisfactory to see this branch of law, hitherto so generally, so unaccountably neglected by our reporters and authors, in hands every way capable of doing it justice, and of developing into something like system our testamentary law.

With the exception of marriage and divorce, the only subjects of interest to the profession here in the English Reports of this class, are those of wills and administration. The peculiar cases growing out of church and parish affairs, which fill a large space in these reports, are of little interest or value here, where there is no union of church and state, to give them authority even as precedents. On the other hand, there are many matters of the first importance, which by statute are brought within the jurisdiction of our Probate and Surrogate Courts, but which in England belong

exclusively to the Law and Equity Courts, such as the settlement of accounts, matters of guardianship, payment of claims and legacies, and sale of the real estate of the deceased, for the payment of their debts.

On all these topics, as well as those of testamentary law in general, these volumes are full of learned and lucid disquisition. The present volume shows the same sustained vigor and facility of execution which marked the others, while, as the series is extended, a greater range and variety of subjects are presented. The number of cases reported in the third volume is greater than in either of the other volumes.

There are two distinct classes of cases in these reports. It must be borne in mind that a Probate Judge is a Judge of fact as well as of law: he is the *Index*, in the true Roman sense, as well as a *Praetor*. Witnesses are examined orally before him: he sees and hears them: he decides the question of fact presented, as well as the questions of law involved: hence, besides the ordinary cases presenting purely legal questions, we have a class of decisions, which are really judicial investigations, of intricate questions of fact.

The cases of *Laycroft* vs. *Simmons*, *Creely* vs. *Ostrander*, and *Carroll* vs. *Norton*, belong to this class. They involve questions of testamentary capacity and influence. In each case, the testator was over eighty years of age, and in the last, the will was *holographic*, a circumstance to which the learned surrogate (citing D'Aguesseau) attaches weight. The wills were all admitted to probate. These opinions, as well as those in *Hyde* vs. *Hyde*, and *Burger* vs. *Hill*, involving the proof and presumption of marriage, are purely judicial inquiries into questions of fact, and are fine specimens of the manner in which a thoroughly trained legal mind deals with a complicated and often contradictory mass of facts. These inquiries often, of course, present important points of law incidentally. Thus in the curious case of *Jeanne Du Lux*, the presumptions as to legitimacy and marriage under the laws of the first French Republic, in relation to record and registration of marriages and births, are considered. This case does not seem to have yet reached a final decision, upon the testimony directed to be taken by commission in France.

Of the purely legal decisions, the case of *Vernam* vs. *Spencer*, is one of the most striking and elaborate. The deceased in that case, had signed his will at the end, in the presence of two witnesses, attending, at his request, by one of whom it had been read over to him: and died in the act of signing it in the margin, before he had time to declare it his will or request them formally to attest it, and before they could subscribe as wit-

nesses. It was held, after an elaborate argument, by John C. Spencer, (the last great effort, we believe, of that eminent lawyer) that although the statute of New York does not require the witnesses to sign in the presence of the testator, yet they must sign at the time of the execution, signing being part of the *factum*, and they must sign in accordance with his wish and request: and although such wish and request might perhaps be inferred from an actual signing with his knowledge of the fact, and the nature of the paper signed, and from his invitation to them to attend as witnesses, yet such signature cannot be supplied after death, however clear his intention. His request is revocatory until complied with. It is revocable by death. A paper which is not a will at the moment of death, cannot become a will by anything done afterwards. Otherwise, heirs might be disseised after descent. And a court can no more order the signature of the witnesses to be supplied, than it could order a man to go on and sign a will he had concluded not to sign, or a witness to subscribe his name to a will he had made up his mind not to attest, no matter what the stage of the matter at which either party breaks off. The whole opinion is admirable for logical force and for terseness of expression. The case is a somewhat special one, arising from the peculiar feature of the New York statute, dispensing with signature by the witnesses in the testator's presence.

On the other hand, while thus insisting upon substantial compliance with all statutory formalities, the Surrogate holds, in *Rieben* vs. *Hicks*, that a declaration to the witnesses *before* they sign, is sufficiently regular, and that the parties are not held to any strict order of succession in going through the ceremonies of execution.

In *Hunt* vs. *Mortrie*, also, it is held that a declaration is necessary to the due execution of a will, and a mere request to sign a paper without proof that the witnesses knew it was a will, or that the testator knew what it was, or that he knew whether they knew, or not, is insufficient. The main question in this case, however, is one hitherto undecided in the English and American books, although it has been thoroughly discussed by the continental jurists. Nor is this the only instance in which the learned Surrogate has been forced to fall back upon the resources supplied by the civil law. The volume bears throughout, marks of the careful study and constant use of the invaluable writings of the continental jurists. The question in this case is the effect upon a will of personalty, executed at the place of the testator's domicil, according to the law of that place, of a change of domicil to a place, by the law of which it is informally executed.

After pointing out the confusion and inconsistency of the English decisions and the clearness and uniformity of the continental authorities, the Surrogate comes to the conclusion, that a will of personal property, valid by the *lex loci actûs*, is valid everywhere, and is not rendered invalid by a change of domicil, and it is intimated that there need be no concurrence of the *lex loci actûs* with the *lex domicilii*. In thus differing in opinion with Judge Story, Surrogate Bradford is sustained, it must be confessed by a most formidable array of continental authorities, even those cited by the learned judge in support of his own position. Conflict of Laws, § 473.

In *Wilson* vs. *Moran*, the validity of a will of a client in favor of his attorney, is considered.

In *Hustin* vs. *Proal*, much learning is condensed in a small space on a rather nice point in the calculation of degrees of kindred. The Surrogate holds that, under the New York statute of distributions, framed upon that of Charles II., which was penned by a famous civilian, Sir Walter Walker, and seems to have been taken in some degree from the 118th Novel of Justinian, an uncle is in the same degree of propinquity as a nephew, and equally entitled to a distributive share. The doubt arose from the fact that by the English rule, a brother is preferred to a grandfather; and the reason of this rule has been sought for in a doubtful (and in our opinion erroneous) construction of the 118th Novel. The argument is, that if a brother is preferred to a grandfather, a brother's son should exclude a grandfather's son. But the English decisions do not admit this conclusion; and so early as *Durant* vs. *Prestwood*, 4 Atkyns, 454, Lord Hardwicke held an aunt and a nephew to be equally entitled. The New York statute expressly directs, in the absence of descendants, a distribution to the next of kin in equal degree: thus doing away, it seems to us, the English rule as to brother and grandparent. The Surrogate, however, we infer from one of the head notes to this case, still recognizes that rule.

We have thus very inadequately noticed a few of the cases in this volume. Surrogate Bradford is laying the profession and the public under a double obligation; for, next to the merit of making a good decision, is that of reporting it well. He is cultivating this new field of our jurisprudence with an ability equal to his sagacity in selecting it. The reputation of the New York bench and bar receives new lustre from his labors; and in a recent English publication, the works of Story, Kent, Bradford, and Wheaton, (three of them sons of New York,) are triumphantly pointed to as proof of the great services rendered by American authors in one important department of literature.